

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**In re:**

**SEARS HOLDINGS CORPORATION, *et al.*,  
  
Debtors.**

Chapter 11

Case No. 18-23538 (RDD)

(Jointly Administered)

**DECLARATION OF ROBERT R. DIVITA IN SUPPORT OF OBJECTION OF URBAN  
EDGE PROPERTIES LP TO NOTICE OF ASSUMPTION AND ASSIGNMENT OF  
ADDITIONAL DESIGNATABLE LEASES**

I, Robert R. DiVita, being duly sworn, depose and say:

1. I am the Deputy General Counsel of Urban Edge Properties LP (“Urban Edge”). Among other responsibilities, I am responsible for (a) reviewing, negotiating and drafting real estate related agreements, including leases and easement agreements; (b) reviewing and negotiating various other documents, including financing-related and real estate acquisition and disposition documents; (c) advising Urban Edge’s internal leasing, development, construction, property management and lease administration teams on various legal matters; and (d) managing the transactional legal group within Urban Edge’s in-house legal department.

2. Based on my review of relevant documents, including those identified herein, and my discussions with personnel and advisors of Urban Edge and the UE Landlords (defined below), I am familiar with the leased premises, the terms of the UE Leases (defined below), and the tenant’s obligations thereunder.

3. Except as otherwise noted, all facts set forth in this declaration (the “Declaration”) are based on my personal knowledge, my discussions with personnel and advisors of Urban Edge and the UE Landlords, my review of relevant documents, or my opinion, based upon my experience and knowledge. In making this Declaration, I have relied in part on

information and materials that the personnel and/or advisors of Urban Edge and the UE Landlords have gathered, prepared, verified, and provided to me, in each case under my ultimate supervision, at my direction, and/or for my benefit in preparing this Declaration.

4. I am over the age of 18, competent to testify, and authorized to submit this Declaration on behalf of Urban Edge and the UE Landlords.

5. I submit this Declaration in support of the *Objection of Urban Edge Properties LP to Notice of Assumption and Assignment of Additional Designatable Leases* (the “Objection”).<sup>1</sup>

**I. Urban Edge**

6. Urban Edge is a real estate investment trust that, through its affiliates, acquires, develops, owns, manages and improves shopping centers in and on the edge of urban communities located throughout the United States and Puerto Rico.

7. Urban Edge and certain of its affiliates directly or indirectly own UE Bruckner and UE Montehiedra.

**A. The Bruckner Lease and Premises**

8. UE Bruckner, as landlord, and Kmart Corporation (“Kmart”), as tenant, are parties to that certain lease dated July 2, 1982 (as amended from time to time, the “Bruckner Lease”), covering certain premises located in a shopping center known as “Bruckner Commons”. The store, which the Debtors have referred to as Store # 9420, has an address of 1998 Bruckner Blvd., Bronx, NY 10473 (the “Bruckner Premises”). Kmart became the lessee under the Bruckner Lease by way of that certain Assignment and Assumption Agreement dated March 17,

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<sup>1</sup> Capitalized terms used but not defined in this Declaration have the meanings ascribed to them in the Objection.

1999.

9. As noted, the Bruckner Premises is part of a shopping center commonly known as “Bruckner Commons”, which was purposely developed as a shopping center and is located in the Bronx, New York.<sup>2</sup> In addition to Kmart, Bruckner Commons is home to a number of other commercial tenants such as Shop Rite, T-Mobile, Burlington Coat Factory, AT&T Mobility, The Children’s Place, Kicks USA and Boston Market. The tenants/stores occupying Bruckner Commons share a common parking area consisting of approximately 1,108 parking spaces and are accessible to customers through common access roads. Moreover, all or nearly all of the tenants within Bruckner Commons abide by fixed hours during which their stores are open. A true and correct copy of the Bruckner Commons property flyer is attached hereto as **Exhibit A**.<sup>3</sup> A true and correct copy of the Bruckner Commons leasing plan is attached hereto **Exhibit B**.<sup>4</sup>

10. Many of the Bruckner Commons tenants’ leases (a) contain exclusive and/or prohibited use provisions that restrict the use of other premises within the shopping center; (b) contain percentage rent provisions; and (c) require the tenants to pay their share of common area maintenance.

## **B. The Montehiedra Lease and Premises**

11. UE Montehiedra, as landlord, and Kmart, as tenant, are parties to that certain lease executed by the predecessor landlord on April 28, 1997 and by Kmart on July 8, 1997 (as

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<sup>2</sup> The Bruckner Commons property website can be found at [http://uedge.com/property\\_home/?propid=BrucknerCommons\\_NY&tabType=property#](http://uedge.com/property_home/?propid=BrucknerCommons_NY&tabType=property#).

<sup>3</sup> The Bruckner Commons property flyer can also be found at [http://uedge.com/property\\_factsheet/?propid=BrucknerCommons\\_NY](http://uedge.com/property_factsheet/?propid=BrucknerCommons_NY).

<sup>4</sup> Bruckner Commons is located between White Plains Road, Turnbull Avenue, Pugsley Avenue and Bruckner Boulevard. The stores identified on the upper left portion of the leasing plan located between Bolton Avenue, Lafayette Avenue, White Plains Road and Story Avenue are not a part of Bruckner Commons; they are part of a separate shopping center called The Shops at Bruckner, which is owned by a separate Urban Edge subsidiary.

amended from time to time, the “Montehiedra Lease”, and together with the Bruckner Lease, the “UE Leases”), covering certain premises located in The Outlets at Montehiedra (also known as the Montehiedra Town Center) in San Juan, Puerto Rico, which premises the Debtors have referred to as Store # 4844 (the “Montehiedra Premises”).

12. The Montehiedra Premises is part of a shopping center commonly known as The Outlets at Montehiedra (the “Montehiedra Outlets”), which was purposely developed as a shopping center and is located in San Juan, Puerto Rico.<sup>5</sup> The Montehiedra Outlets is a one level enclosed mall with over 100 stores such as Kmart, Polo Ralph Lauren, Nike Factory Store, The Gap, Marshalls, GNC and Home Depot. Tenants occupying the Montehiedra Outlets share a common parking area consisting of approximately 3,050 parking spaces and are jointly advertised on the Montehiedra Outlets website.<sup>6</sup> The stores at the Montehiedra Outlets share common walls and internal doors or passageway for customers to pass between. Moreover, all or nearly all of the tenants within the Montehiedra Outlets abide by fixed hours during which their stores are open. A true and correct copy of a recent version of the Montehiedra Outlets leasing plan is attached hereto **Exhibit C**.

13. Many of the Montehiedra Outlets tenants’ leases (a) contain exclusive and/or prohibited use provisions that restrict the use of other tenant’s premises within the shopping center; (b) contain percentage rent provisions; and (c) require the tenants to pay their share of common area maintenance and trash removal. In addition, the Montehiedra Lease is subject to, and specifically incorporates, the Deed of Constitution of Reciprocal Easements and Restrictive

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<sup>5</sup> The Montehiedra Outlets property website can be found at [http://uedge.com/property\\_home/?propid=TheOutletsatMontehiedra\\_PR&tabType=property](http://uedge.com/property_home/?propid=TheOutletsatMontehiedra_PR&tabType=property).

<sup>6</sup> The Montehiedra Outlets/Montehiedra Town Center website can be found at [http://www.montehiedratowncenter.com/english/mall\\_info\\_inter.aspx](http://www.montehiedratowncenter.com/english/mall_info_inter.aspx).

Covenants, dated December 19, 1991, as amended (the “Montehiedra REA”) that sets forth, *inter alia*, additional use provisions that restrict the use of the premises within the shopping center.

## **II. April 19 Designation Notice**

14. I have reviewed the April 19 Designation Notice, which designates for assumption and assignment various real property leases, including the UE Leases. According to the April 19 Designation Notice, the Buyer seeks to assign the UE Leases to an entity named “Transform Operating Stores LLC” (the “Proposed Assignee”), which upon information and belief is a newly created subsidiary of the Buyer.

15. I have reviewed Exhibit 1 to the April 19 Designation Notice, which identifies (i) the Bruckner Lease with a proposed cure amount of “\$0.00”; and (ii) the Montehiedra Lease with a proposed cure amount of “\$0.00”.

16. On April 26, 2019, Urban Edge received a letter provided by the Buyer’s counsel containing limited general information regarding the Buyer and its affiliated entities on a consolidated basis (the “Adequate Assurance Letter”). A true and correct copy of the Adequate Assurance Letter is attached hereto as **Exhibit D**.

## **III. Cure Amount**

17. The proposed cure amounts set forth in the April 19 Designation Notice are incorrect.

### **A. The Known Obligations**

18. The total pre-petition and post-petition Known Obligations due and owing to each UE Landlord under its UE Lease, are as follows:

#### ***i. Bruckner Lease***

19. The Known Obligations due and owing to UE Bruckner under the Bruckner Lease as of the Petition Date is \$315,297.40, which is comprised as follows:

<b><u>Category of Obligation</u></b>	<b><u>Relevant Section of Lease</u></b>	<b><u>Amount Owning</u></b>
Base Rent	<i>See Bruckner Lease, § 4.</i>	(\$51,178.32)
Common Area Maintenance	<i>See Bruckner Lease, § 7.</i>	\$89,920.45
Real Estate Taxes	<i>See Bruckner Lease, § 9.</i>	\$273,090.27
Pass Through Billing		\$3,465.00
<b>Total Pre-Petition Amounts Due</b>		<b>\$315,297.40</b>

20. In addition to the above amounts, various obligations under the Bruckner Lease totaling \$737,462.65 (which includes amounts recently becoming due for the month of May 2019) have become due and owing after the Petition Date (through the date of this Objection), which is comprised as follows:

<b><u>Category of Obligation</u></b>	<b><u>Amount Owning</u></b>
Base Rent	\$154,880.82
Common Area Maintenance	\$74,708.71
Real Estate Taxes	\$507,573.12
Pass Through Billing	\$300.00
<b>Total Post-Petition Amounts Due</b>	<b>\$737,462.65</b>

21. The total cure amount due on the Bruckner Lease as of the date hereof is **\$1,052,760.05**. This amount might change to the extent additional amounts become due, or to the extent any of the amounts described above are paid, after the date hereof and prior to the effective date of any assumption and assignment of the Bruckner Lease.

*ii. Montehiedra Lease*

22. There are no Known Obligations due and owing to UE Montehiedra under the Montehiedra Lease as of the Petition Date. There is an existing pre-petition net credit owing to Kmart in the amount of (\$28,287.23). However, various obligations under the Montehiedra Lease totaling \$154,458.04 (which includes amounts recently becoming due for the month of May 2019) have become due and owing after the Petition Date (through the date of this Objection), which amount is comprised as follows:

<b><u>Category of Obligation</u></b>	<b><u>Category of Obligation</u></b>	<b><u>Amount Owing</u></b>
Base Rent	<i>See Montehiedra Lease, § 3.</i>	\$121,282.42
Common Area Maintenance	<i>See Montehiedra Lease, § 13.</i>	\$9,842.24
Real Estate Taxes	<i>See Montehiedra Lease, § 4.</i>	\$24,475.07
Other Credits		(\$1,141.69)
<b>Total Post-Petition Amounts Due</b>		\$154,458.04

23. The total cure amount due on the Montehiedra Lease as of the date hereof, net of the pre-petition credit described above, is **\$126,170.81**.

24. This amount might change to the extent additional amounts become due, or to the extent any of the amounts described above are paid, after the date hereof and prior to the effective date of any assumption and assignment of the Montehiedra Lease.

**i. Additional Surviving Obligations**

25. The amounts described above reflect Known Obligations as of the date of this Objection and do not include (a) pre-petition and post-petition monetary obligations under the UE Leases that accrued or arose prior to the date of the assignment but were unknown, undetermined, unliquidated, contingent or not yet due as of the date of the assignment, including but not limited to obligations not yet determined on account of year-end adjustments and

reconciliations for rent, taxes, and common area maintenance charges; and (b) pre-petition and post-petition non-monetary obligations under the UE Leases, including but not limited to insurance, contribution and indemnification obligations (such obligations described in (a) and (b) the “Surviving Obligations”).

#### **IV. Bruckner Commons and the Montehiedra Outlets Are “Shopping Centers”**

26. In further evidence that Bruckner Commons and the Montehiedra Outlets are “shopping centers”, I provide the following additional information:

(1) **Combination of Leases.** Bruckner Commons and the Montehiedra Outlets are each comprised of a mix of many retailers and each of these tenants is subject to a separate lease.

(2) **Single Landlord.** UE Bruckner is the landlord of all stores within Bruckner Commons, and UE Montehiedra is the landlord of all stores within the Montehiedra Outlets.

(3) **Commercial Retail Distribution.** Each of the retailers at Buckner Commons and Montehiedra Outlets are engaged in the commercial retail distribution of goods. Retailers at Bruckner Commons include, among others: Kmart, Shop Rite, Burlington Coat Factory, Kick USA, AT&T Mobility and The Children’s Place. Retailers at Montehiedra include, among others: Kmart, Marshalls, Gap Factory Store, Nike Factory Store, Polo Ralph Lauren Factory Store, Aldo, T-Mobile, Boost Mobile, Puma Outlet, Sketchers Outlet and the Sunglass Hut.

(4) **Common Parking Area.** The stores within each of Bruckner Commons and the Montehiedra Outlets share common parking lots and other common areas, and the stores are accessible by customers through common access roads.

(5) **Shopping Center Development.** Bruckner Commons and the Montehiedra Outlets were purposely developed as shopping centers. Indeed, as described by the Montehiedra Outlets website, the Montehiedra Outlets is “a one level enclosed mall with over 100 stores [a]nchored



by Big Kmart, Home Depot, Marshall's, Capri, a fourteen-screen theater complex and a food court that offers over a dozen choices.”<sup>7</sup>

(6) **Fixed Hours.** All or nearly all of the tenants within each of Bruckner Commons and the Montehiedra Outlets abide by fixed hours during which their stores are open.

(7) **Joint Advertising.** The stores within the Montehiedra Outlets engage in joint advertising, such as through the Montehiedra Outlets website.

(8) **Contractual Interdependence.** The leases in each of the shopping centers, including the UE Leases, are contractually interdependent. For example, many of the leases, including the UE Leases, contain exclusivity and/or restrictive use provisions which limit other tenant's uses of their respective stores. In addition, all or nearly all of the tenants in Bruckner Commons and the Montehiedra Outlets are required, pursuant to their leases, to pay a share of the costs of common area maintenance as well as a share of real estate taxes, and nearly all of the tenants in the Montehiedra Outlets share the costs of trash removal.

(9) **Percentage Rent.** The UE Leases contain percentage rent provisions. Many of the other tenants' leases at both Bruckner Commons and the Montehiedra Outlets contain percentage rent provisions.

(10) **Joint Trash Removal and Other Maintenance.** All or nearly all of tenants in Bruckner Commons and the Montehiedra Outlets are required, pursuant to their leases, to pay a share of the costs of common area maintenance (usually calculated based on the square footage of the tenant's premises), real estate taxes and, at the Montehiedra Outlets, trash removal.

(11) **Tenant Mix.** As contemplated by the exclusive and prohibited use provisions in the UE Leases and many other tenants' leases, and as described above, each of Bruckner Commons

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<sup>7</sup> The Montehiedra Outlets/Montehiedra Town Center website can be found at [http://www.montehiedratowncenter.com/english/mall\\_info\\_inter.aspx](http://www.montehiedratowncenter.com/english/mall_info_inter.aspx).

and the Montehiedra Outlets contain a mix of many different types of commercial retail tenants.

(12) **Contiguity.** As illustrated by the Bruckner Commons leasing plan, Bruckner Commons is a contiguous area with common parking lots connecting all of the stores, many of which share common walls. The Montehiedra Outlets is a one level enclosed mall with over 100 stores, which share common walls and internal doors or passageway for customers to pass between. The stores at the Montehiedra Outlets are accessible to customers through common access roads.

**V. Adequate Assurance of Future Performance**

27. I have reviewed (a) various materials that have been publically disclosed regarding the Buyer's financial wherewithal and business plan,<sup>8</sup> (b) the Adequate Assurance Letter and [REDACTED] provided by the Buyer's counsel, and (c) the following Kmart Form 10-K reports: (i) Kmart's Form 10-K for the fiscal year ended January 28, 1998, filed with the Securities Exchange Commission on April 14, 1998; (ii) Kmart's Form 10-K for the fiscal year ended January 27, 1999, filed with the Securities Exchange Commission on April 15, 1999; and (iii) Kmart's Form 10-K for the fiscal year ended January 26, 2000, filed with the Securities Exchange Commission on April 19, 2000.

28. Urban Edge has serious concerns about the Proposed Assignee's creditworthiness and ability to perform under the UE Leases. As a newly created entity, the Proposed Assignee has no operating history, and its specific assets, liabilities, management and projections are unknown.

29. The Adequate Assurance Letter, which is presented on a consolidated basis

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<sup>8</sup> The publically disclosed materials include, without limitation: *Declaration of Mohsin Y. Meghji*, Ex. B [Docket No. 2336]; *Declaration of William L. Transier*, Ex. A [Docket No. 2341]; *Declaration of Kunal S. Kamlani in Support of ESL's Omnibus Response in Support of the Going Concern Sale Transaction*, Ex. A, B, and C. [Docket No. 2356].

among the Buyer and its affiliates, is completely absent of any information specifically relating to the Proposed Assignee on a standalone basis, let alone any pertinent data points that would permit Urban Edge to properly evaluate the Proposed Assignee's overall financial wherewithal and creditworthiness.

30. The Buyer states [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Adequate Assurance Letter at 2. [REDACTED]

[REDACTED] but Urban Edge has no information as to the assets, liabilities and projections of the Proposed Assignee. Likewise, the Buyer alleges [REDACTED]

[REDACTED]

[REDACTED] See Adequate Assurance Letter at 2-3.

However, without further specificity, it is impossible for Urban Edge to develop an understanding as to what extent [REDACTED]

[REDACTED] the substantial liabilities assumed by the Buyer under the Global Sale, let alone the obligations under the UE Leases. For the above reasons, it is also impossible for Urban Edge to compare the financial condition of the Proposed Assignee to that of Kmart in the late 1990s.

31. In the ordinary course of its business, Urban Edge typically requires credit enhancements, in the form of security deposits, letters of credit and third party guaranties when leasing (or assessing a proposed assignment of a lease) to certain companies based on their financial information and history. Here, although the Buyer has provided Urban Edge certain

information arguably relevant to the Proposed Assignee's purported ability to perform under the UE Leases, such information is inadequate. The Buyer has not provided information from which Urban Edge can reasonably conclude that the Proposed Assignee will be able to perform under the UE Leases.

32. The headwinds facing the Buyer and its affiliates are well known. Even assuming that the Buyer and its affiliates can achieve all of its aggressive growth, cost cutting, and loyalty program assumptions presented in connection with the Global Sale, they are no Kmart of the 1990s. Given the fact that the Buyer [REDACTED]  
[REDACTED]  
[REDACTED] little comfort that the Buyer itself will have sufficient cash to operate and meet its financial obligations going forward.

33. The Adequate Assurance Letter does not sufficiently explain how the Buyer and its affiliates will turn around an enterprise that has experienced a near decade-long decline in highly competitive conditions, or how the Proposed Assignee will be able to meet its obligations under the UE Leases for the remainder of their terms. Likewise, the fact that [REDACTED]  
[REDACTED] says nothing about the Buyer's ability to [REDACTED] to run a retail business, earn a profit, and pay debts as they come due.

*[Remainder of Page Intentionally Left Blank]*

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct.

Dated: May 2, 2019  
New York, New York

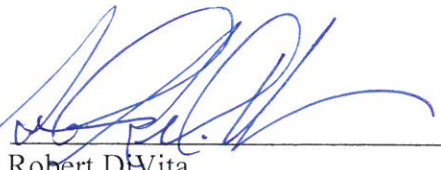
By:   
Name: Robert DiVita  
Title: Deputy General Counsel of Urban  
Edge Properties LP

Exhibit A

Bruckner Commons Property Flyer

White Plains Road and Turnbull Avenue • Bronx, NY 10473 • Bronx County



## Center Information:

Major Stores: K Mart • Shop Rite • Madrag - Coming Soon •  
Dime Savings Bank • AT&T Mobility • Envy Nails  
• Urban Eyes • Omnipoint Communications

Location: White Plains Road & Bruckner Boulevard

Regional Access: Bruckner Expressway (I-278)

Total GLA: 372,086 SF

Parking Spaces: 1,108



## Demographics:

	Population	Average Household Income	Median Household Income
1 Miles	112,044	\$53,367	\$41,076
2 Miles	324,303	\$56,442	\$42,614
3 Miles	671,898	\$56,921	\$42,298



**URBAN EDGE**  
PROPERTIES

888 Seventh Ave, 6th Floor, NY, NY 10019 • General Inquiries: 212-956-2556 • Leasing: 844-614-4114 • uedge.com

White Plains Road and Turnbull Avenue • Bronx, NY 10473 • Bronx County

## Tenant Spaces (Square Feet):

1 - 186,584 K Mart	7 - 1,909 Available	13 - 3,656 AT&T Mobility	201 - 1,364 New York Community Board 9
2 - 33,273 Shop Rite	8 - 3,366 Vacant	14 - 1,496 Urban Eyes	202 - 8,401 Urban Health Plan
3 - 43,244 Vacant	9 - 3,675 Dime Savings Bank	15 - 0 Available	203 - 8,358 Available
4 - 1,750 Boston Market	10 - 3,880 Vacant	16 - 5,228 Kicks	204 - 1,866 Envy Nails
5 - 2,095 T-Mobile	11 - 4,200 The Children's Place	21 - 23,360 Burlington	205 - 3,777 Available
6 - 1,828 Available	12 - 4,240 Madrag - Coming Soon	111 - 24,536 Burlington	

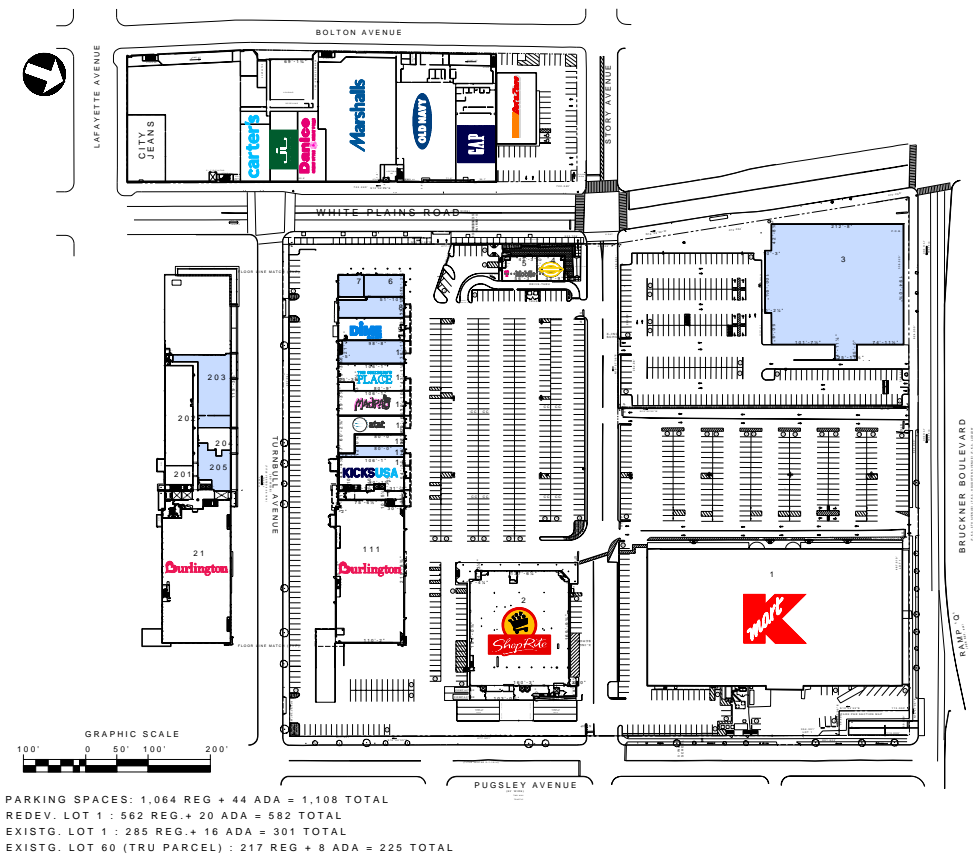




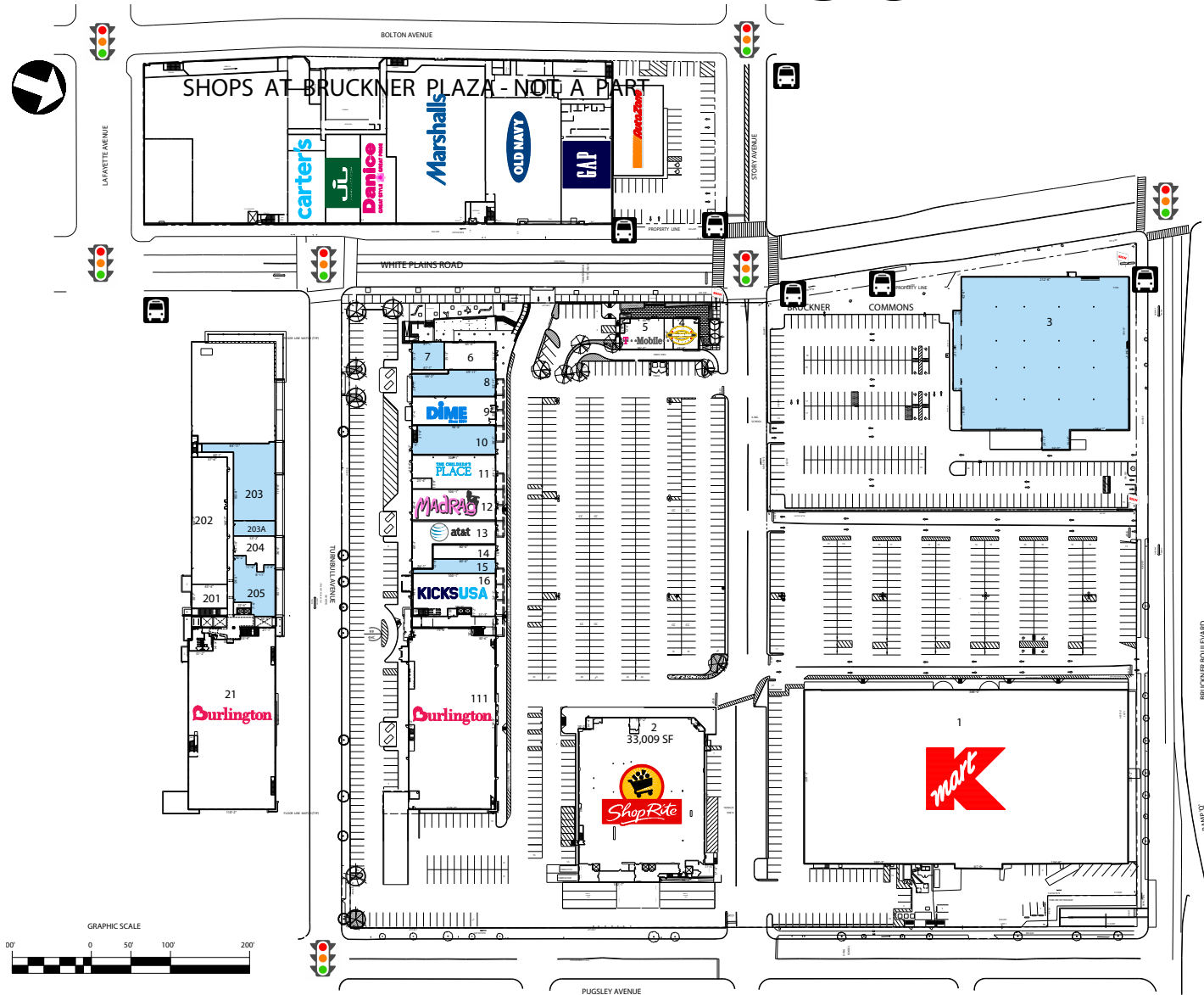
Exhibit B

Bruckner Commons Leasing Plan

# BRUCKNER COMMONS

Floor: 01

5/1/19



WEB Suite#	Tenant Name	Curr. Rentable (SF)
1	Kmart Corporation	186,584
2	Shop Rite	33,009
3	Vacant	43,244
4	Boston Market	1,750
5	T-Mobile	2,095
6	Smashburger	2,289
7	Vacant	1,447
8	Vacant	3,366
9	The Dime Savings Bank	3,675
10	Vacant	3,881
11	The Children's Place	4,200
12	Madrag	4,240
13	AT&T	3,656
14	Urban Eyes	1,496
15	Vacant	1,660
16	Kicks, U.S.A. Inc.	5,228
21	Burlington	23,360
111	Burlington	24,536
201	Community Board 9	1,364
202	Urban Health Plan, Inc.	8,401
203	Vacant	6,808
203a	Vacant	1,230
204	Envy Nails	1,866
205	Vacant	3,816
Total		373,201
Parking Spaces		1,108
Parking Ratio		2.97 per 1,000 sf

Exhibit C

Montehiedra Outlets Leasing Plan



Exhibit D

Adequate Assurance Letter

**[FILED UNDER PENDING MOTION TO SEAL]**